IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARIE BELL, Respondents, and HARVEST MANAGEMENT SUB LLC; AND DAVID E. LUJAN, Real Parties in Interest.	Case No. 81975

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

As Petitioner, Aaron Morgan ("Morgan"), explained when he filed his writ petition, he only seeks conditional relief in this original proceeding. In other words, if the Court is inclined to alter or otherwise disturb the District Court's order granting a new trial in Case No. 80837 (*see* 27 PA 4284–4294), the Court is not limited to simply dismissing Morgan's claims against Real Party in Interest, Harvest Management Sub LLC ("Harvest"). Rather, the Court can grant Morgan's requested relief in this proceeding by extending the judgment against Real Party in Interest David Lujan ("Lujan") to Harvest according to NRCP 49(a)(3). Ironically, many of the arguments that Harvest presents in this original proceeding undermine its own arguments in Case No. 80837. That is, Harvest's arguments taken together in both proceedings demand that the new trial limited to the factual issues of Lujan acting within the course and scope of employment with Harvest should go forward. 27 PA 4284–4294. Nevertheless, if the Court delves into the legal issues in these two pending writ petitions, Morgan asks this Court to grant his requested relief.

In response to the arguments presented in Harvest's answer to writ petition, Morgan presents the Court with the following arguments: (A) Morgan admittedly raised his NRCP 49(a)(3) issue with Chief Judge Bell; (B) Morgan's timeliness arguments is misplaced; (C) Harvest cannot avoid the plain language of

NRCP 49(a)(3); (D) Harvest does not meaningfully respond to Morgan's cases discussing that Lujan was within the course and scope of employment; (E) Harvest's argument that Morgan should simply wait until a final judgment to appeal undermines its own writ petition in Case No. 80837; and (F) Harvest does not meaningfully challenge Harvest's estoppel argument.

For these reasons, this Court should grant extraordinary relief to Morgan and order the judgment on the jury verdict to be extended to Harvest since Lujan was acting within the course and scope of his employment with Harvest when he crashed into and injured Morgan.

II. LEGAL ARGUMENT

A. MORGAN ADMITTEDLY RAISED HIS NRCP 49(a)(3) ISSUE WITH CHIEF JUDGE BELL.

Harvest argues that Morgan did not raise or renew his NRCP 49(a)(3) argument with Chief Judge Bell. Ans. at 17–18. But, it acknowledges within this same legal argument section that Morgan did indeed raise the issue with Chief Judge Bell. Ans. at 18. Indeed, Morgan argued before Chief Judge Bell:

> MR. ECHOLS: We did file a motion for entry of judgment in front of Judge Gonzalez on a Rule 49(a), and 49(a) essentially says that if there is an issue not submitted to the jury -- or not decided by the jury, then it's a question for the judge to answer. And here we have what is clearly a clerical error.
>
> THE COURT: Yeah.
>
> MR. ECHOLS: Now, the fact that Judge Gonzalez denied our motion for entry of judgment is really of no consequence. It's not law

> of the case, and actually [NRCP] 54(b) allowed the Court to revisit that. Because the logical conclusion is, if Harvest's motion for entry of judgment is denied, then the only alternative is to then grant our requested relief, which is to add Harvest to the verdict form and, therefore, the judgment. I'm happy to go into more details, but I know we've argued this, I think, twice already, and so I don't want to do that unless Your Honor wants it.
>
> THE COURT: No. That's okay.

27 PA 4281–4282. This oral argument was presented in addition to Morgan's opposition to Harvest's motion for entry of judgment. 24 PA 3752–3758. As such, Harvest's reliance upon EDCR 2.24 to bar any relief to Morgan is misplaced. First, Harvest's argument that the District Court's decision does not mention the denial of Morgan's requested NRCP 49(a) does not remove the issue from this Court's review. Rather, the absence of a ruling from the District Court implies that Morgan's argument was rejected. *See Board of Gallery of History Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) ("The absence of a ruling awarding the requested expenses constitutes a denial of the claim.") (citation omitted). Second, in situations prior to the entry of a final judgment, this Court has confirmed the ability of parties to request reconsideration. *See In re Manhattan W. Mechanic's Lien Litig.*, 131 Nev. 702, 707 n.3, 359 P.3d 125, 128 n.3 (2015) ("[The petitioner] argues that the district court erred in reconsidering the motion. [The petitioner's] argument is without merit because NRCP 54(b) permits the district court to revise a judgment that adjudicates the rights of less than all the parties until it enters judgment

adjudicating the rights of all the parties."). And, the NRCP take precedence over the EDCR. In *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 583, 245 P.3d 1190, 1193 (2010), this Court explained that any dispute over the conflict between the NRCP and EDCR 2.24 would favor the NRCP according to NRCP 83: "[A]s a local district court rule [EDCR 2.24] it could not be otherwise, since NRCP 83 prohibits local rules that are inconsistent with the NRCP. . . ." Therefore, Morgan properly raised his NRCP 49(a)(3) in the District Court, which was denied.

B. HARVEST'S TIMELINESS ARGUMENT IS MISPLACED.

Relying upon its flawed argument that Morgan did not properly raise his NRCP 49(a)(3) argument in the District Court, Harvest suggests that Morgan is seeking extraordinary relief of an order that is over two years old. Ans. at 18–19. However, Morgan actually seeks such relief from this Court, which is the same order from which Harvest seeks relief in Case No. 80837. Thus, Harvest's timeliness argument also does not prohibit Morgan's requested relief from this Court. *See, e.g.,* NRS 34.160 ("The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. . . .").

C. HARVEST CANNOT AVOID THE PLAIN LANGUAGE OF NRCP 49(a).

1. This Court Has Never Interpreted NRCP 49(a)(3).

Not surprisingly, Harvest attempts to downplay the importance of NRCP 49(a)(3), so much that it represented to this District Court that is Court had already rejected Morgan's NRCP 49(a)(3) argument: "MR. KENNEDY: Your Honor, just one point with respect to their 49(a) motion, the Supreme Court ruled Rule 49(a) does not apply. So that – that question is settled." 27 PA 4282. Of course, this Court did not resolve the 49(a)(3) issue in either this case or in any other similar case. For this reason, Morgan asked this Court to retain this writ petition in his routing statement according to NRAP 17(a)(11) and (12). Harvest's answer does not contain its own routing statement and, thus, concedes Morgan's position. *See* NRAP 31(d)(2); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) ("We elect to treat the Chronisters' failure to respond to this argument in the three pages of argument in their answering brief as a confession of error."). Therefore, the Court should take the opportunity to interpret the plain language of NRCP 49(a)(3), as applied to this case. *See Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) ("One such instance is when a writ petition offers this court a unique opportunity to

define the precise parameters of . . . a [rule of civil procedure] that this court has never interpreted.").

2. The Plain Language of NRCP 49(a)(3) Does Not Contain Harvest's Suggested Language Regarding "Ultimate Liability."

In an effort to avoid the plain language of NRCP 49(a)(3), Harvest suggests that this Court should limit the application of this Rule to only issues not involving "ultimate liability." Ans. at 23–28. But, the plain language of NRCP 49(a)(3) does not contain such a limitation: "**Issues Not Submitted.** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict." Harvest does not dispute that court rules are construed in the same manner as statutes. *See Webb v. Clark County Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009) (indicating that "the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure") (citations omitted); *Williams v. United Parcel Servs.*, 129 Nev. 386, 391–392, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.") (citing *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494,

498, 915 P.2d 288, 290 (1996)). Harvest's proposed additions to NRCP 49(a)(3) amount to prohibited conjecture. *See S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.").

3. Harvest's Liability Is Based Upon Respondeat Superior.

Harvest's answer suggests that it is somehow being deprived of its day in court. However, respondeat superior/vicarious liability is based upon the acts of its employees—in this case—Lujan. *See McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 932–933, 408 P.3d 149, 152 (2017) ("Vicarious liability is '[l]iability that a supervisory party . . . bears for the actionable conduct of a subordinate . . . based on the relationship between the two parties.' BLACK'S LAW DICTIONARY, 1055 (10th ed. 2014). The supervisory party need not be directly at fault to be liable, because the subordinate's negligence is imputed to the supervisor.") (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 13 (Am. Law Inst. 2000)). Accordingly, Harvest has not been deprived of procedural due process, nor would it be upon the extension of the judgment against it. *See J.D. Constr., Inc. v. IBEX Int'l Group, LLC*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). Certainly, Harvest has had notice and an opportunity to be heard over the course of several

years in this litigation. Thus, the imposition of respondeat superior liability by way of NRCP 49(a)(3) is a correct remedy that this Court should order under the circumstances of this case.

D. HARVEST DOES NOT MEANINGFULLY RESPOND TO MORGAN'S CASES DISCUSSING THAT LUJAN WAS WITHIN THE COURSE AND SCOPE OF EMPLOYMENT.

In this writ petition, Morgan outlined a number of authorities to demonstrate that Lujan was, in fact, within the course and scope of his employment with Harvest, such that Harvest should be liable for Lujan's actions. Pet. at 20–25. Instead of squarely addressing these cases, many which are Nevada law, Harvest scoffs at the cases and offers cases from foreign jurisdictions. Ans. at 28–32. Harvest then claims that such arguments were never raised in the District Court, even though the challenged order discusses these very issues. 27 PA 4287–4290. Essentially, Harvest claims that Lujan acted on his own en route to pick up passengers in the company bus. But, Nevada law does not permit such an after-the-fact defense under the circumstances of this case. *See United States Fid. & Guar. Co. v. Fisher*, 88 Nev. 155, 160, 494 P.2d 549, 552 (1972) ("Once an owner voluntarily hands over the keys to his car, the extent of permission he actually grants is irrelevant."). The *Fisher* court expanded upon this reasoning by explaining that "[a] named insured untutored in law and fearful that his consent might lead to his own liability for damages in excess of the policy limits (indeed by statute in some jurisdictions he would be so liable) may well be

tempted to invent a claim that he prohibited others to drive or to convert a precatory request into a binding prohibition. . . . We add that the fear of insurance policy cancellations might well have the same effect." *Fisher*, 88 Nev. at 159–160, 494 P.2d at 551 (citations and internal quotation marks omitted). As the Court can see from the evidence that is presented, this is precisely what has happened in this case.

Ultimately, Morgan asks this Court to adopt his line of legal reasoning with respect to Lujan's course and scope of employment. Morgan's position is not only rooted in Nevada law, but it also supports important policies that this Court has reiterated. *Cf. Buma v. Providence Corp. Dev.*, 453 P.3d 904, 908 (Nev. 2019) ("There is no choice but for traveling employees to face hazards away from home in order to tend to their personal needs, 'including sleeping, eating, and seeking fresh air and exercise,' and reasonably entertaining themselves, on their work trips."). While Harvest argues that there is no evidence to support Morgan's course-and-scope theory, it fails to appreciate that this evidence is found within the District Court's own factual recitation:

- "On April 1, 2014, David Lujan a driver employed by Harvest Management, was driving a Harvest-owned shuttle bus. At lunchtime, Mr. Lujan drove the company bus to a public park to eat his lunch. After Mr. Lujan finished his lunch , Mr. Lujan was leaving the park in the company bus when Mr. Lujan crossed in front of Aaron Morgan's car at an intersection." 27 PA 4284.

- "Harvest's answer to the complaint and the evidence at trial established that Mr. Lujan was an employee and under the control of Harvest. Harvest also admits in its answer that Harvest had control of the bus that Mr. Lujan was driving, and that Harvest had entrusted the bus to Mr. Lujan." 27 PA 4287.

- "At trial, Mr. Lujan testified that he drove Harvest's bus to the park to eat lunch, and that he was leaving the park when the accident occurred." 27 PA 4287–4288.

- "Under this burden shifting framework, Harvest's admissions that it owned the bus and that Mr. Lujan was Harvest's employee would have made Harvest responsible for providing evidence that Mr. Lujan was not acting for Harvest's benefit at the time of the accident. Evidence that Mr. Lujan was returning from lunch would not necessarily be sufficient to rebut the presumption on its own." 27 PA 4289.

- "Here, there was not sufficient evidence presented at trial to determine that Mr. Lujan was not acting within the scope of his employment as a matter of law." 27 PA 4289.

- "Harvest presented nothing to suggest that Harvest was contesting vicarious liability for the accident." 27 PA 4292.

Based upon these facts, the Court should order the District Court to conclude under NRCP 49(a)(3) that the judgment in favor of Morgan and against Lujan also extends to Harvest.

E. HARVEST'S ARGUMENT THAT MORGAN SHOULD SIMPLY WAIT UNTIL A FINAL JUDGMENT TO APPEAL UNDERMINES ITS OWN WRIT PETITION IN CASE NO. 80837.

Harvest offers its own estimation that the Court need not interpret or apply NRCP 49(a)(3) to this case. Ans. at 20. As such, Harvest claims that this Court should simply allow a final judgment to be entered, and Morgan can later seek relief from an appeal. However, the post-trial proceedings in this case have been ongoing for approximately three years since the jury's verdict in April 2018. 12 PA 1856–1857. And, both parties have unsuccessfully attempted to have a final judgment entered. Thus, an appeal from a final judgment would not be a plain, speed, and adequate remedy. *See D.R. Horton, Inc. v. Eighth Judicial Dist. Court of Nev.*, 123 Nev. 468, 475, 168 P.3d 731, 736 (2007) ("In this case, which has already existed below in a pre-litigation stage for more than two and one-half years, and which involves a pre-litigation notice of constructional defects designed to prevent litigation altogether, an eventual appeal from any final judgment would be neither a speedy nor adequate remedy. Consequently, writ relief is not precluded by other means of review."). Importantly, Harvest attempts to create one rule for itself in Case No. 80837, while creating another

rule for Morgan. But, Harvest's argument should be rejected, given the abnormally-long proceedings after the jury's verdict, without a final judgment being entered. Therefore, Morgan urges this Court to grant his requested relief according to NRCP 49(a)(3).

F. HARVEST DOES NOT MEANINGFULLY CHALLENGE MORGAN'S ESTOPPEL ARGUMENT.

Notwithstanding the seriousness of Morgan's estoppel argument, Harvest takes it lightly and instead argues waiver. Ans. at 21–23. But, Harvest does not actually address its acquiescence in the verdict form at the time of trial, only to now argue just the opposite. Pet. at 15–17. In essence, Harvest has taken an inconsistent position in an attempt to obtain an unfair advantage, and has now prolonged this litigation for over three years, with no apparent end in sight. The circumstances of this case squarely fall within the definition of "judicial estoppel." *See Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287–288, 163 P.3d 462, 469 (2007) (applying judicial estoppel when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage") (citation and internal quotation marks omitted).

In any event, Harvest's waiver argument is without merit, due to the invited error doctrine. The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit. 18 PA 2831 ("Yeah. That

looks fine."). It has been held that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it. In most cases application of the doctrine has been based on affirmative conduct inducing the action complained of, but occasionally a failure to act has been referred to. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (citing 5 AM. JUR. 2d *Appeal and Error*, § 713, at 159–160 (1962); *People v. Marshall*, 50 Cal. 3d 907, 790 P.2d 676, 687, 269 Cal. Rptr. 269 (Cal. 1990), *cert. denied*, 1110 (1991); *Pettingill v. Perkins*, 2 Utah 2d 266, 272 P.2d 185, 186 (Utah 1954)). "Furthermore: The rule that error induced or invited by the appellant is not a proper subject of review on appeal has been applied, in both civil and criminal cases, to a large variety of trial errors, including claimed misconduct of the judge, or alleged error having to do with the jury." *Id.* (citing 5 AM. JUR. 2d *Appeal and Error*, § 721, at 165 (1962)). Therefore, the Court should reject Harvest's waiver argument and determine that Harvest has already acquiesced in the very verdict form of which it has challenged for nearly three years.

III. CONCLUSION

In summary, this Court should grant extraordinary relief to Morgan and order the judgment on the jury verdict to be extended to Harvest based upon the following reasons: (A) Morgan admittedly raised his NRCP 49(a)(3) issue with Chief Judge Bell; (B) Morgan's timeliness arguments is misplaced; (C) Harvest

cannot avoid the plain language of NRCP 49(a)(3); (D) Harvest does not meaningfully respond to Morgan's cases discussing that Lujan was within the course and scope of employment; (E) Harvest's argument that Morgan should simply wait until a final judgment to appeal undermines its own writ petition in Case No. 80837; and (F) Harvest does not meaningfully challenge Harvest's estoppel argument.

DATED this 22nd day of March, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

proportionally spaced, has a typeface of 14 points or more and contains 3,871 words and a motion to exceed has been filed with the Court; or

does not exceed ____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** was filed with the Supreme Court of Nevada on the 22nd day of March, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that the foregoing documents were mailed via U.S. Mail to the following:

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